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IN THE
Supreme Court of the United States

ANITA C. ROBINSON,
EDITH M. BRADFORD,
LINDA MINES,
CAROLYN A. DINGWALL,
DELPHINE M. JONES,
Petitioners,

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT,
METROPOLITAN DAY SCHOOL INC.,
Respondents.

On Petition for Writ of Certiorari
to the District of Columbia Court of Appeals

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment *8*

SUPPLEMENTAL BRIEF OF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioners submit this supplemental brief of intervening matter pertaining to question three (3) of the Petition for Writ of Certiorari for the Ward 5A-06 Commissioner who was unable to file *amicus curiae.*

STATUTORY BACKGROUND

The relevant statutes, provisions and cases that bar Advisory Neighborhood Commissioners standing to seek judicial review of agency decisions are set forth in pages 13-16, of the petition for a writ of certiorari. Section 1-1510 of the District of Columbia Code, Administrative Procedure Act, contains a specific prohibition against Advisory Neighborhood Commissions from seeking court review of agency actions. This prohibition was encoded in the ANC Act of 1975 which provided in relevant part that the :

> "Commission shall not have the power to initiate a legal action in the Courts of the District of Columbia or in the Federal Courts, provided that this limitation does not apply to or prohibit any Commissioner from bringing suit as a citizen...." *Actof1975,* D.C. Law 1-58, March 26, 1971, D.C. Code 1981 Supplement, section 1-261(g).

The issue of standing to seek judicial review of agency decisions by Advisory Neighborhood Commissioners was raised in *Kopff v. D.C. ABC Board.* The court in *Kopff* (Opinion of J. Ferren) held that Advisory Neighborhood Commissioners in their official roles have no capacity to seek judicial review of agency decisions; however, the Commissioners and other area residents have standing to assert claims as individuals . D.C. App. 381 A.2d 1372 (1977). D.C. Code, 1981, section 1-1510, states in relevant part:

> "Area residents who (*were*) commission members, however, have standing to initiate such review and to assert rights of commission itself. *Id*

The petitioners in the following paragraphs will illustrate the ambiguity of this law to the extent that it serves to bar individual commissioners whose land may be directly affected by land use decisions as well as to preclude the protection of the statutory advisory right of Advisory Neighborhood Commissioners in their capacity to advise.

STATEMENT OF THE CASE

The procedural history of this case is outlined explicitly on pages 1-2 of the Petition for a Writ of Certiorari, the petitioners outline the following details:

The Ward 5A-06 single-member-district (SMD) Advisory Neighborhood Commissioner, Mary Baird-Currie filed a Motion for Rehearing/Reconsideration .

On September 10, 1999, on behalf of the community residents and the Advisory Neighborhood Commission before the Board of Zoning Adjustment (BZA). This motion was subsequently denied, and a copy of the Motion's Order is outlined on pp. 26a-28a of the Petition for a Writ of Certiorari.

The SMD Advisory Neighborhood Commissioner resides within the zone of interest of the site, Metropolitan Day School, and would normally based upon relevant D.C. law (1-1510) meet the requirement of falling within the zone of interests to be protected or regulated by this statute.

On August 9, 1999, the SMD Advisory Neighborhood Commissioner joined a petition for a review with the other named petitioners before the District of Columbia Court of Appeals, alleging a violation of her individual due process rights and a denial of her right to present neighborhood views before the BZA.

Following a "show cause Order" by the D.C. Court of Appeals on September 8, 1999, that the "Commissioner/ Petitioners" show cause as to why they should be granted standing, and why the court had jurisdiction, the court dismissed the petition for review as the petitioners lacked standing.

I. VIOLATION BY EXISTING STATUTES OF THE RIGHTS OF INDIVIDUAL ADVISORY NEIGHBORHOOD COMMISSIONERS TO SEEK JUDICIAL REVIEW OF AGENCY DECISIONS AS ORDINARY CITIZENS.

The language of *Kopff v. D.C. ABC Board* as encoded in D.C. Code Section 1-1510 lends toward the interpretation that it is the area residents who reside within an advisory neighborhood boundary that have standing to seek judicial review and represent the views of the ANC itself. Although the case includes a reference to commissioners as individuals being able to seek judicial review of agency decisions, it is unclear as to whether this reference is to a current commissioner or a former one ("area residents who were commission members, however have standing"). The individual commissioner therefore appears to risk at least the possibility of preclusion from initiating legal actions, where their own rights as an ordinary citizen is challenged, and is therefore dependent upon area residents to represent his/her views and the ANC instrumentality. This is especially true in agency actions that may affect such commissioner's property interests.

In *Wheeler v. D.C. BZA,* the D.C. Court of Appeals held pursuant to *Kopff* that the ANC Commissioners in their official capacities, lacked standing to seek judicial review; however, the Court held that nine of ANC commissioners in their individual capacities could petition the Court of Appeals for review. D.C. App. 395 A. 2d 85 (1978). By contrast, the court held in *Don't' Tear it Down, Inc. v. D.C. Dept of Housing,* that the chairman of Advisory Neighborhood Commission 3A as an individual could not be granted standing in place of the 3A ANC to seek judicial review. The court held also in *Don't Tear It Down,* that the ANC 3A Commissioner need not be substituted as a petitioner because two original parties in opposition were petitioners on appeal, the 3A Commissioner did not wish to file an additional brief and the Commissioner did not assert that the existing petitioners could not represent the interests of the ANC. D.C. App., 428 A. 2d 369 (1981). The language adopted in D.C. Code 1-261, 1981, of the Home Rule Act and in Section 1-1510 of the D.C. Code regarding standing to seek judicial review states in relevant part:

"An Advisory Neighborhood Commission (*has*) no capacity to seek court review of an action of the District of Columbia Alcoholic Beverage Control Board in issuing a liquor license; area residents who (*were*) Commission members, however, have standing to initiate such review and to assert rights of the Commission itself..."

The petitioners maintain that the reference to commissioners in the past tense in the D.C. Code coupled with the language of *Kopff v. D.C. ABC Board*, allows for interpretations of standing requirements by the Court that preclude individual ANC Commissioners standing to seek judicial review in the courts. Such was the issue here that forced the petitioners to file a Petition for Writ of Certiorari in this Court. Standing should have been granted to the single-member-district Commissioner for three-fold reasons (1) she resided within "the arguable zone of interest; (2) her statutory right to present the neighborhood views before the BZA was disallowed by the agency, and (3) only she could adequately present the views of the Advisory Neighborhood Commission before the appellate body.

II. VIOLATION BY EXISTING STATUTES OF THE STATUTORY ADVISORY RIGHTS OF ADVISORY NEIGHBORHOOD COMMISSIONERS.

The previous relevant discussions within this brief and the Petition for Writ of Certiorari are incorporated herein.

The District of Columbia Court of Appeals held in Kopff v. DC ABC Board that the role of the Advisory Neighborhood Commissions is "advisory" in nature. The Court concluded that

the right of Advisory Neighborhood Commissions to advise should be protected and formulated the basis that the advisory right of the ANC is protected through the ability of area residents to seek judicial review of agency decisions. It is surmised that Advisory Neighborhood Commissioners in their advisory roles cannot seek judicial review of agency decisions, if the agency hinders the commissioner's statutory right to represent neighborhood residents' views.

The petitioners hold that the view held by the Court in *Kopff v. ABC Board* does not protect the statutory rights, duties and powers invested personally to the elected Advisory Neighborhood Commissioner for the benefit of the neighborhood residents they represent. It is the job of each single-member-district Commissioner to present the residents' views within such Commissioner's district to government agencies. Hence, the SMD Commissioner in the official role as community representative should be entitled to seek judicial protection in the appellate court if the agency interferes with that representative's actual elected advisory right. Petitioners state that the specific violation of ANC Commissioners' duties may not be properly presented before an appellate court by area residents, neither should it be their responsibility. Petitioners also state that the appellate court in its discretion and given the phrasing of D.C. Code statute 1-1510 could actually preclude Commissioners as individuals from adequately protecting the statutory rights of their elected office.

It is the *advisory neighborhood commissioner* through which the ANC instrumentality assures presentation of neighborhood views. Hence, not only are area residents injured when an ANC's statutory rights are abridged by an agency to the extent that it cannot adequately present neighborhood views, injury results to the advisory neighborhood Commissioner, within whose single-

member district, the "zone of interests" sought to be protected lies. Thus, *advisory neighborhood commissioners* in their advisory role are "persons aggrieved" by agency actions which violated ANC rights because they have also suffered "injury in fact" and this injury is within the zone of interests sought to be protected by the ANC Act and other relevant statutes to the particular case. 5 U.S.C. 702; D.C. Code § 1-1510; *Kopff v. ABC Bd.*381, A 2d. 381, A 2d 1372 (1977) App. D.C.; *Data Processing Service v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L.E. 2d 184 (1970), *Barber v. Collins*, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970).

Judicial review of administrative decisions is favored; thus, any legislative intention to abridge such review must be shown by clear and convincing evidence. *Rusk v. Cort,* 369 U.S. 367, 82 S. Ct. 787 7 L. Ed. 2d , 809 (1962); 1507, 18 L. Ed. 2d 681 (1967) *Abbott Laboratories v. Gardner,* U.S. 136, 141, 87, S. Ct.,(1987). The DCAPA affords such review to:

> "[a]ny person suffering a legal wrong, or adversely affected or aggrieved, by an Order or decision of the Mayor or agency." D. C. Code Supp. 1999, Stat. 1-1510. § 1-1502 (b)(9) of the D.C. Code states in relevant part:

The "persons" entitled to review include "public or private organizations of any character. D.C. Code § 1-261 and DCAPA 1-1510 places an express prohibition upon Advisory Neighborhood Commissions to initiate judicial review of agency decisions; however, that prohibition should not preclude standing to an individual advisory neighborhood commissioner where ANC rights and individual rights are violated by agency decisions. The inability of the commissioner in the official role as advisor to have standing to seek judicial review if that right is violated by the agency is unconstitutional because it violates the substantive due

process rights of the commissioner to protect the duties of his/her office.

The DCAPA and the Federal statute upon which it is based (5 U.S.C Statute 702) and based upon the Court's interpretation of the statutes provide no adequate means for protection of rights of officers of one of the most fundamental governmental instruments through which the governmental bureaucracy may come to grips with issues that are relevant to the citizens of the District of Columbia. D.C. Code § 1-261 states in relevant part:

> "Area Neighborhood Commissions are political subdivisions of the District of Columbia government and therefore do not receive due process protections under the Constitution against the actions of the District of Columbia. *Tenley &. Cleveland Park Emergency Commission v. District of Columbia Board of Zoning Adjustment*, App. D.C., 550 A. 2d 331 (1988), cert. Denied, 489 U.S. 108, 19 S. Ct. 1539. 103 L. Ed. 2d. 843 (1989).

The interpretation by the Court in *Kopff v. D. C. ABC Board* along with the language expressed in D. C. Code Statute 1-1510, that Advisory Neighborhood Commissioners in their official role lack standing to initiate judicial review of agency decisions to guarantee protection of their advisory role amounts to the reduction of these elected officials to "sophisticated serfdom".

Congress and the District of Columbia government have effectively formulated a means through which citizen's concerns may be ignored in favor of other interests. Congress in this wise is not effectively enforcing the equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The District of Columbia Council within the last thirty (30) days has introduced legislation regarding the "great weight" provisions allotted to ANC views before government agencies. The Ward 5A-06 Commissioner views this legislation as language that essentially waters down the existing "great weight" provisions encoded in the D.C. Code. The petitioners urge the Court to clarify the ambiguity of language in the D.C. code and instruct revision to the Code regarding the issue of standing to seek judicial review of agency decisions by advisory neighborhood commissioners.

Respectfully submitted,

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